United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1099

To be argued by
JONATHAN J. SILBERMANN

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

ERASMUS FLECHA,

Defendant-Appellant.

Docket No. 76-1099

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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OF THE UNITED STATES DISTRICT COURT
GOR THE EASTERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the erroneous admission of co-defendant Gonzalez' hearsay statement as evidence against appellant Erasmus Flecha requires reversal of the judgment.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Eastern District of New York (The Honorable Jack B. Weinstein) entered on January 26, 1976, after a jury trial,[1] convicting Erasmus Flecha of importing marijuana (21 U.S.C. §§960(a)(1), 952(a), and 18 U.S.C. §2) (Count One), possession of marijuana with intent to distribute (21 U.S.C. §841(a)(1) and 18 U.S.C. §2) (Count Two), and conspiracy to import and distribute marijuana (21 U.S.C. §§841(a)(1), 952, 960(a)(1)), all in violation of the conspiracy statute (21 U.S.C. §§963, 846) (Count Three).

Appellant Flecha was sentenced to four years' imprisonment and two years' special parole on each of Counts One, Two, and Three, the sentences to run concurrently.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal pursuant to the Criminal Justice Act.

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[1] The jurors rendered their verdict on May 2, 1973. On September 17, 1973, appellant was sentenced in absentia, and judgment was entered. On January 9, 1974, the previous judgment was vacated, and appellant was re-sentenced. On October 22, 1975, appellant moved pursuant to 28 U.S.C. §2255 for vacature of his sentence on the ground that he had not been informed of his right to appeal. Judge Weinstein granted this motion on January 23, 1976. Appellant was re-sentenced and judgment re-entered as of that date. This appeal is from that judgment.

Statement of Facts

Erasmus Flecha, along with co-defendants Hugo Suarez, Moises Banguera, Ernesto Santo Gonzalez, and Jose Pineda-Marin, were charged with participation in a scheme to import and distribute 287 pounds of marijuana from a ship docked at a Brooklyn pier.[2]

The first witness at trial[3] was John Grieco, a Special Agent of the United States Bureau of Customs, who testified that on March 25, 1973, at 8:30 p.m., he and fourteen other agents took up surveillance positions in and about the State Pier in Brooklyn for the purpose of watching for suspected

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[2]The indictment is B to appellant's separate appendix.

[3]Prior to trial, defense counsel sought to suppress the physical evidence on the ground that the arrests and seizure lacked reasonable basis. After a lengthy hearing, Judge Weinstein ruled that the arrests were reasonable (138). Appellant Flecha does not raise this issue on appeal.

Also prior to trial defense counsel, based upon information gained from a recent news conference called by a special New York State narcotics district attorney, inquired whether certain wiretaps had supplied data leading to the arrest of appellant and his co-defendants (7-8). After receiving an explanation of the news conference and wiretaps from New York State narcotics authorities, Judge Weinstein decided to listen to the tapes in camera (138). Subsequently, he announced that the tapes had proven irrelevant to the case. See trial transcript for April 26, 1973, at 1A-5A. The Judge did, however, permit counsel for all the defendants to examine several pages of the wiretap transcript and to question New York City Police Lieutenant Torres at an evidentiary hearing on November 15, 1973. After the hearing, Judge Weinstein reaffirmed that the wiretap was irrelevant to this case. See Memorandum and Order, November 13, 1973. Appellant does not challenge this ruling on appeal.

narcotics activities aboard the Colombian ship, Francisco Miguel, which had docked earlier that day (166[4]). Grieco, who shared an observation post with Special Agent Graham in a second-floor office overlooking the ship's stern, related that from 10:00 p.m. to midnight he observed co-defendants Suarez and Pineda-Marin engage in conversations on the deck of the ship (172, 200). Although a heavy rain began to fall about midnight, and although Grieco admitted that he had to adjust his position to see the ship (197), Grieco claimed that his vision was satisfactorily clear because he used binoculars and because the ship was sufficiently well lighted (169-171).

Further, Grieco testified that at 1:50 a.m. four men came from the deckhouse dragging heavy objects. The men dragged the objects to midship and through a darkened passage toward the water side of the ship (175[5]). Although Grieco stated that he saw the faces of the four men only momentarily (244), he identified appellant as one of the four (174-175). Moreover, Grieco related that as a result of a radio message from one of the agents,[6] he ordered the agents to board the ship at

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[4]Numerals in parentheses refer to pages of the transcript of the suppression hearing and trial.

[5]Grieco's view was of the dock side of the Francisco Miguel and he therefore lost sight of the objects until after the arrests (see infra). Throughout this brief the sides of the ship are referred to as the "dock" side and the "water" side.

[6]The various agents near the ship were in radio communication with Grieco.

approximately 1:58 a.m. (178). Co-defendants Pineda-Marin and Suarez were immediately apprehended while they stood in conversation at the gangplank on the dock side (190, 360). Appellant and Gonzalez were arrested on deck (190), and co-defendant Banguera was apprehended on the pier (330).[7] Upon gaining access to the water side, the agents found four large burlap bales which subsequently were found to contain 287 pounds of marijuana in carefully wrapped sub-packages (180-181).

Also testifying for the Government[8] were Customs Bureau Special Agents Robert Graham, Eugene Weinschenk, Henry Maurer, and Victor Cabrera, all of whom also participated in the surveillance, arrests, and seizure. These agents confirmed Grieco's rendition of the incident, and also described the circumstances of the arrest of each defendant.[9]

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[7]Appellant Flecha and co-defendants Gonzalez and Pineda-Marin were identified as three of the four men who had been seen dragging the bales; the fourth man remained unidentified. Co-defendant Suarez was on deck, but did not drag the bales (174-177; 202).

[8]The Government also introduced a stipulation concerning the chemist's report, which identified the seized substance as marijuana (302).

[9]Graham identified appellant as one of the men dragging the bales and stated that he saw appellant and co-defendant Pineda-Marin engage in various conversations (304-306). Weinschenk testified that at approximately 2:00 a.m. he saw two persons run onto the pier. One went into the water while the other waited (327-328). The agent relayed this information to Grieco, who then gave the signal for the agents to board the

Agent Cabrera testified that after being ordered to board the ship, he saw appellant and co-defendant Gonzalez running on the water side of the ship toward the stern (362). While chasing them, Cabrera slipped and his gun went off. Cabrera stated that Gonzalez then stopped (363), but appellant continued to run (363). Shortly thereafter appellant was arrested at the entrance to the crew's quarters (364).

After the arrests the five defendants were lined up on the deck. There, Agent Cabrera heard co-defendant Gonzalez, "who appeared to be talking" to appellant, say, "Why so much excitement? If we are caught, we are caught"[10] (365).

Defense counsel requested that the Court instruct the jurors that Gonzalez' statement was not binding on the other defendants. Although this application was granted as to co-defendants Suarez, Banguera, and Pineda-Marin, the Judge ruled that the statement was admissible against appellant after determining that he was standing six to twelve inches away from Gonzalez.[11]

(Footnote continued from the preceding page)

ship (329). Weinschenk arrested the man who remained on the pier, a man he later identified as Banguera (330-347).

[10]Cabrera testified that the statement was made in Spanish but that he was fluent in that language (365).

[11]The testimony about Gonzalez' statement and the decision of the District Court are D to appellant's separate appendix.

After the captain of the Francisco Miguel testified,[12] the Government rested and defense counsel moved for a directed verdict of acquittal on the ground that the Government had failed to prove that appellant knew what was in the bales (466). The District Court denied the motion (468).

After the defense case and the charge, the jurors deliberated for approximately one day, after which they found appellant and his co-defendants guilty as charged.[13]

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[12] The captain testified that appellant was not a member of the crew of the Francisco Miguel. However, he also testified that friends of the crew members visited the ship (427, 423, 439).

[13] Barguera was found guilty of Count Three after Counts One and Two were dismissed upon his attorney's motion (463).

ARGUMENT

THE ERRONEOUS ADMISSION OF CO-DEFENDANT GONZALEZ' HEARSAY STATEMENT AS EVIDENCE AGAINST APPELLANT ERASMUS FLECHA REQUIRES REVERSAL OF THE JUDGMENT.

Gonzalez' hearsay statement was, over objection, admitted by the District Court as evidence of appellant's guilt and his knowledge of the illicit nature of his acts. Although the District Court articulated no reason for admitting the evidence against appellant but not against the other defendants, from the Judge's questions it appears that the evidence was admitted against appellant on the theory that he had adopted Gonzalez' admission of guilt by remaining silent in the face of it. This ruling was incorrect and requires reversal.

Appellant's silence, especially after arrest, was not probative of his acquiescence in Gonzalez' statement. As the Supreme Court has recognized:

> In most circumstances silence is so ambiguous that it is of little probative force. For example, silence is commonly thought to lack probative value on the question of whether a person has expressed tacit agreement or disagreement with contemporaneous statements of others. See 4J. Wigmore, EVIDENCE, §1071 (Chadbourn rev. 1972).
>
> United States v. Hale, 43 U.S.L.W. 4806, 4807 (June 23, 1975).

Moreover, the traditional guarantee that silence in fact indicates an adoption of another's statements is complete

lacking here.

> Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question. 3A Wigmore, EVIDENCE §1042 (Chadbourn rev. 1970).
>
> United States v. Hale, supra, 43 U.S.L.W. at 4807.

Here, Gonzalez' admission of guilt did not call for any response from appellant. Compare United States v. Geaney, 417 U.S. 1116, 1120 (2d Cir. 1969); United States v. Wiley, 519 F.2d 1348, 1350 (2d Cir. 1975). Moreover, appellant, who had just been arrested, had no obligation to speak.[14] Miranda v. Arizona, 384 U.S. 436 (1966); United States v. Hale, supra, 43 U.S.L.W. at 4807.

Thus, since the statement involved did not contain any assertion which appellant could reasonably be expected to deny and was made at a time when appellant had no duty to respond, it was erroneously admitted against appellant.[15]

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[14] One commentator has noted:

> Since any well advised prospective defendant will know enough to say nothing about possible criminal activities even at the hint of a possible official investigation, silence should almost invariably be excluded in a criminal trial as evidence of a defendant's guilt.
>
> Weinstein and Beyer, EVIDENCE, ¶801(d)(2)(B)[01] at 801-129.

[15] Gonzalez' statement was not admissible as a co-conspirator's declaration since it was not made during the course and in furtherance of the conspiracy. Krulewitch v. United States, 336

Moreover, Gonzalez' admission was so important to the Government's case that its erroneous admission into evidence requires reversal. The Government failed to introduce any direct evidence to prove that appellant had knowledge that marijuana was in the bales, an essential element of the crimes charged, United States v. Agueci, 310 F.2d 817, 828 (2d Cir. 1962); United States v. Morello, 250 F.2d 631, 634 (2d Cir. 1957); United States v. Stromberg, 268 F.2d 256, 267 (2d Cir. 1959), or that appellant had joined a conspiracy. Although appellant was not a member of the crew, friends of the crew did visit the ship. Moreover, appellant's conversations with co-defendant Pineda-Marin were not overheard, and the relationship between appellant and the others was unknown.[16] Further, there was no proof to indicate that appellant was aware of

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U.S. 440, 443-444 (1949); Anders v. United States, 417 U.S. 211, 218-219 (1974); United States v. Moore, 522 F.2d 1068, 1077 (9th Cir. 1975) (rehearing denied); United States v. Smith, 520 F.2d 1245, 1247 (8th Cir. 1975). Nor was it a verbal act, since the statement did not accompany any conduct and give legal significance to that contemporaneous conduct. See United States v. D'Amato, 493 F.2d 359, 364 (2d Cir. 1974); United States v. Tramunti, 513 F.2d 1086, 1109 (2d Cir. 1975); compare United States v. Wiley, supra, 519 F.2d at 1350.

[16] Although appellant ran when the agents boarded the ship, Judge Weinstein stated: "I do not see that that is not what any sensible person would do with someone coming up with a gun," (479). He therefore refused to instruct the jurors on the inferences to be drawn from that conduct.

the two persons on the pier and that one of them had started to swim toward the ship. Appellant's dragging of one burlap bale was insufficient to infer participation in a conspiracy or knowledge of the contents of that bale. United States v. Moore, 522 F.2d 1068, 1077 (9th Cir. 1975); United States v. Stromberg, supra, 268 F.2d at 267; United States v. Agueci, supra, 310 F.2d at 828; United States v. Morello, supra, 250 F.2d at 633-34.

Thus, Gonzalez' statement was important in establishing appellant's knowledge of guilt and the illicit nature of his otherwise innocent acts. Moreover, in his summation, the Assistant United States Attorney argued that this was a proper inference for the jurors to draw (569-570). In light of the weakness of the Government's case, the jurors may have relied on this statement, and its admission was therefore not harmless. See Kotteakos v. United States, 328 U.S. 750, 764-65 (1946); Glasser v. United States, 315 U.S. 60, 67 (1942); United States v. Moore, supra, 522 F.2d at 1077-78; United States v. Smith, supra, 520 F.2d at 1248

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE JUDGMENT OF CONVICTION SHOULD BE VACATED AND THE CASE REMANDED FOR A NEW TRIAL.

Respectfully submitted,

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April 9, 1976

CERTIFICATE OF SERVICE

April 9, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Nathan Silbermann